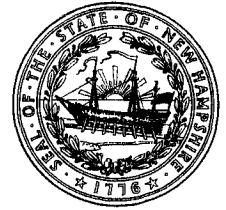




The State of New Hampshire  
*Department of Environmental Services*  
**Water Council**

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**STATE OF NEW HAMPSHIRE**  
**WATER COUNCIL**

**Decision & Order**  
**Notice of Appeal**

**Docket No. 05-16 WC**

Appeal of Pollard Realty Trust  
In Re: Shoreland Protection Act Waiver Denial File No. 2005-1394

**Background**

On August 25, 2005 the Department of Environmental Services, Wetlands Bureau ("DES") denied an application to rebuild a nonconforming primary structure, File # 2005-1394, ("the Application") filed by Pollard Realty Trust ("the Appellant"). DES determined that the proposed project to reconstruct within the 50 ft setback to the reference line did not comply with the Comprehensive Shoreland Protection Act.

On September 23, 2005 Attorney David R. Putnam filed a Notice of Appeal ("the Appeal") with the NH Water Council ("the Council") on behalf of the Appellant. The subject of the Appeal was the August 25, 2005 DES decision to deny the Application. The Appeal was assigned Docket No. 05-16 WC by the Council.

On October 12, 2005 the Council voted to accept the Appeal.

On December 2, 2005 Attorney Jennifer J. Patterson filed an Appearance with the Council on behalf of DES.

A Pre-hearing Conference was convened on December 5, 2005 and the Appeal Hearing was scheduled for February 8, 2006.

On February 8, 2006, following proper notice to all parties, the Council held an evidentiary hearing on the subject appeal in accordance with RSA 21-O:5-a, and Env-WC 200. The Council listened to testimony, presentation, and argument by the Appellant and DES. Immediately following the appeal hearing, the Council decided to deliberate and vote on the appeal.

### **Findings & Conclusions**

The first witness called by Attorney Putnam was appellant Patty Pollard. Ms. Pollard testified that she had a letter from the Town of Hebron Zoning Board approving the project. She also testified that she would have needed no state permits and no septic improvement to reconstruct on the same footprint. She said that the DES site inspector said he would ask for more information if required but never did, so she assumed that everything was OK.

The next witness for the appellant was surveyor Alan Barnard. Mr. Barnard testified that he prepared the plans and designed the new septic system for the appellants. He felt that since the Comprehensive Shoreland Protection Act ("CSPA") states that waivers can be granted if the proposed structure is substantially more conforming, that the waiver should have been granted because it was his opinion that the proposed structure *was* substantially more conforming. He stated that the present structure had 785 sq. ft. inside the setback area and the new structure would have 485 sq. ft. inside the area. Construction photos were shown of another house in Hebron where a variance was allowed even closer to the water than the proposed Pollard structure. The Council felt that since each case is a separate entity, the photos had little if any relevance to the current case.

The next witness for the appellant was Chris Bryson from DES. Mr. Bryson testified that after a site visit he was going to recommend approval. He also said that if he required more information in conjunction to the papers filed with the appeal he would ask the Pollards. He said he did not ask for more information. On cross examination, Attorney Jennifer Patterson asked about appellant's failure to submit a plot plan, rooftop height, and other information she argued was required by the CSPA for variance to be granted. Bryson said he didn't feel a request for additional information was needed as the decision to deny the application had been made by his superiors and a letter to that effect was being drafted at that time.

The appellants rested their case.

Attorney Patterson's opening statement made reference to the burden of proof in proceedings of this nature. Attorney Patterson argued that the burden was on the appellant to prove that the decision made by DES was arbitrary, unlawful or capricious. She also argued that the CSPA is specific as to requiring the same degree or more protection in a more nearly conforming structure.

DES' first witness was Darlene Forst, an administrator in the DES Shoreland Protection Program. Ms. Forst testified that she requested additional information from the site inspection. A member of the Council asked how distance was computed, and how the substantially more conforming data was determined. Ms. Forst replied that it was by field inspection, with more information requested if necessary. She said that Bryson made a recommendation that DES ask for more information and after she studied the information she made a recommendation to require additional information relative to the application. Assistant Water Division Director Rene Pelletier requested the additional information, but the nature of the information wasn't disclosed. Subsequently, Mr. Pelletier determined that there was nothing on the property to inhibit full compliance with the CSPA because it was a complete teardown and reconstruct project. During cross examination by Attorney Putnam Ms. Forst was asked if there was any grade analysis. Mrs. Forst said no. Attorney Putnam asked if she thought any additional information was required, she said no. He asked if there was any scientific analysis or resource analysis, she said no.

DES' next witness was Water Division Assistant Director Rene Pelletier. Mr. Pelletier testified that the Town of Hebron could not grant a waiver of a state statute, in this case the CSPA statute. He testified that because of the topography, (the lack of any really substantial grade) that it would not be a hardship to locate the structure outside the 50' setback required by the CSPA. He said that septic capacity, location, or age was not an issue in the decision. Mr. Pelletier testified that any new structure outside the footprint of the original structure would require a new septic anyway. Attorney Putnam's cross examination revealed that Mr. Pelletier made the decision based partially on incomplete photographs of the lot as well as the information that had been submitted.

Some of the councilors felt that the language of the CSPA (that a waiver may be granted) made granting or not granting a waiver arbitrary on its face, one of the criteria for granting an appeal. Others felt that it wasn't the Pollard's fault that the Town of Hebron overstepped its authority in granting a variance, and that they thought they were doing what they needed to do to accomplish their project.

However, a majority of the Council felt that since there was enough land, without significant topographical impedance, to locate the structure completely conforming to the 50' CSPA setback regulation, and that it was a complete teardown and reconstruction project, that the appeal should be denied.

The Council vote to deny this appeal was by simple 5-3 majority.

The Council finds that the DES decision in this case was not arbitrary, unlawful or capricious.


**Decision & Order**

The subject Appeal is **DENIED**.

**Reconsideration**

Pursuant to Env-WC 203.29(a), any person whose rights might be directly affected by this decision may file a motion for rehearing within 30 days of the date of this decision. The motion must contain the information specified in Env-WC 203.29(b). Copies of any motion for rehearing shall also be sent or delivered to all other parties of record. Pursuant to Env-WC 203.29(e), this decision shall become final if no motion for rehearing is filed within 30 days.

So Ordered for the Council:

  
Michael P. Sclafani, Appeals Clerk

April 4, 2006